

SOVEREIGN IMMUNITY AND THE DISCRETIONARY FUNCTION EXCEPTION OF THE ALASKA TORT CLAIMS ACT

I. INTRODUCTION

It is as much the duty of government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals.¹

—Abraham Lincoln

The Alaska Tort Claims Act² abolished the doctrine of sovereign immunity and thus made the state liable for its torts. The state's tort liability, however, is subject to a limited exception for discretionary functions performed by state entities and employees.³ In actions brought under the Alaska Tort Claims Act, the Alaska Supreme Court has inconsistently applied the discretionary function exception.

The purpose of this note is to examine the Alaska Supreme Court's construction of the discretionary function exception to state tort liability. After a brief historical introduction to the concept of sovereign immunity in the United States at the federal and state levels, the note discusses three major judicial approaches to defining discre-

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1. First Annual Message to Congress by President Lincoln (Dec. 3, 1861), *reprinted in* 6 MESSAGES AND PAPERS OF THE PRESIDENTS (1789-1897) 51 (published by Richardson 1897); *see also* Comment, *Sovereign Immunity in Georgia*, 27 EMORY L.J. 717, 741 (1978).

2. ALASKA STAT. §§ 09.50.250-300 (1983) (enacted in 1962).

3. *Id.* § 09.50.250(1). The Alaska Tort Claims Act provides in pertinent part:

A person or corporation having a . . . tort claim against the state may bring an action against the state However, no action may be brought under this section if the claim

(1) is an action for tort, and based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion involved is abused.

This note will not consider the other exception included within this subsection of the Alaska Tort Claims Act which expressly grants immunity to the state for its actions conducted with due care, without regard to the validity of the statute or regulation. Clearly, governmental entities or employees are not negligent for actions performed with due care pursuant to a valid statute. Therefore, this grant of immunity is likely to have a greater impact on potential state tort liability for actions taken pursuant to an invalid statute or regulation. The note examines only the discretionary function exception which provides immunity for *tortious* state conduct performed under a *proper* grant of authority. *See infra* text accompanying notes 126-38.

tionary governmental acts. The note then reviews the Alaska Supreme Court's decision in *Abbott v. State*,⁴ which adopted the planning-operational approach for defining discretionary governmental functions which are entitled to immunity under the Alaska Tort Claims Act.⁵ This approach provides immunity for tortious state acts which are predicated upon basic policy considerations. The note follows with an examination of the more recent Alaska decisions and criticizes the court's inconsistent treatment of the immunity issue. Finally, the note proposes a return to a pure application of the planning-operational distinction as articulated in *Abbott*. This approach serves the legislative purposes behind the discretionary function exception to tort liability and provides guidelines for the application of the exception.

II. EVOLUTION OF THE SOVEREIGN IMMUNITY DOCTRINE

A. The Federal Approach Prior to 1946

Historically, the doctrine of sovereign immunity provided personal immunity to the monarch for his actions. Later, immunity protected the nation-state and lesser governmental entities.⁶ By the mid-nineteenth century, the concept of sovereign immunity was accepted by the federal and state courts in the United States.⁷

The United States Supreme Court, however, did not immediately accept the concept of governmental immunity. In fact, the Court, in *Chisholm v. Georgia*,⁸ rejected the argument that the states enjoyed immunity from suit by individual citizens of other states.⁹ Chief Justice Jay seemed to refute the notion that the concept of governmental immunity was applicable to a republican form of government, which, unlike the feudal societies of Europe, is based upon a social contract. He stated that:

In *Europe* the sovereignty is generally ascribed to the *Prince*; here it rests with the people; there, the sovereign actually administers the Government; here, never in a single instance; our Governors are the agents of the people, and at most, stand in the same relation to their sovereign, in which regents in *Europe* stand to their sovereigns. Their *Princes* have *personal* powers, dignities, and pre-eminences, our rulers have none but *official*; nor do they partake in the sovereignty otherwise, or in any other capacity, than as private citizens.¹⁰

4. 498 P.2d 712 (Alaska 1972).

5. *Id.* at 718. The planning-operational approach is discussed *infra* in text accompanying notes 49-63.

6. See Hink & Schutter, *Some Thoughts on the American Law of Governmental Tort Liability*, 20 RUTGERS L. REV. 710, 711 (1965-66).

7. See *id.* at 711-12.

8. 2 U.S. (2 Dall.) 419 (1793).

9. *Id.* at 479.

10. *Id.* at 472 (emphasis in original). The Supreme Court's view on state sover-

The Supreme Court first applied the doctrine of sovereign immunity to bar a tort action against the federal government in its 1868 decision, *The Siren*.¹¹ The Court justified its application of sovereign immunity on the basis of:

reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception.¹²

Despite the Supreme Court's language in *The Siren*, the Court has recognized exceptions to the application of sovereign immunity. Claims against the United States were permitted when the United States consented to suit by some act of Congress,¹³ when proceedings were initiated by the United States,¹⁴ or when another party was substituted as a defendant in the place of the United States.¹⁵

In addition, Congress used its authority to pass private bills to compensate individuals for injuries suffered as a result of negligent activities of federal governmental entities and employees.¹⁶ The private bill method resulted in a deluge of bills.¹⁷ The burdensome and expen-

eignty in *Chisolm* was rejected by the passage of the eleventh amendment, which prevented the judicial power of the United States from being extended to suits commenced against a state by citizens of another state or a foreign state. U.S. CONST. amend. XI; see Note, *Separation of Powers and the Discretionary Function Exception: Political Question in Tort Litigation Against the Government*, 56 IOWA L. REV. 930, 933 n.14 (1971).

11. 74 U.S. (7 Wall.) 152 (1868). Attention had been given to the doctrine of sovereign immunity by Justice John Marshall in *United States v. Clarke*, 33 U.S. (8 Pet.) 436 (1834), where he stated in dictum that the federal government could invoke the doctrine. *Id.* at 444. The doctrine was first applied to the federal government in a contract action in *United States v. McLemore*, 45 U.S. (4 How.) 286 (1846).

12. *The Siren*, 74 U.S. (7 Wall.) at 154.

13. *Clarke*, 33 U.S. (8 Pet.) at 444 (Act of Congress settling land claims seen as a waiver of sovereign immunity).

14. *The Siren*, 71 U.S. (7 Wall.) at 154 (United States may waive sovereign immunity, but may not be liable for costs or relief beyond the demand or property in controversy).

15. *United States v. Lee*, 106 U.S. 196, 197 (1882) (ejectment action brought against officers of the United States to recover land confiscated during the Civil War); see also Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1955*, 1966 U. ILL. L.F. 795, 800 (practice involves a legal fiction as to the actual party being sued and does not truly waive sovereign immunity).

16. See generally Kramer, *supra* note 15, at 800 n.25.

17. See Mikva, *Sovereign Immunity: In a Democracy the Emperor Has No Clothes*, 1966 U. ILL. L.F. 828, 831 n.23 (citing H.R. REP. No. 1287, 79th Cong., 1st Sess. 2 (1945)) (over 15,000 private bills were considered by Congress in the six years prior to the passage of the Federal Tort Claims Act).

sive congressional investigations of the merits of every claim¹⁸ underscored the need for the Federal Tort Claims Act.

B. The State Approach Prior to 1946

Prior to 1946, the state courts generally granted immunity from tort liability to state entities and employees.¹⁹ The states, however, did not absolutely adhere to the concept of immunity. For example, a Kentucky court allowed a state-run restaurant to be sued for breach of contract.²⁰ Similarly, many state courts permitted victims of state torts to recover damages.²¹ In addition, states provided legislative relief to certain classes of individuals deprived of a damage remedy by sovereign immunity. Many state legislatures created committees and administrative bodies to consider the petitions of individuals. Deserving claims received compensation upon passage of a private bill by the legislature.²²

C. Abrogation of Sovereign Immunity After 1946

By the mid-twentieth century, sovereign immunity was applied less frequently on both the federal and state levels of government.²³ In 1946, Congress passed the Federal Tort Claims Act,²⁴ which provided for a general waiver of federal immunity for all governmental torts subject to certain defined exceptions.²⁵ Many states subsequently enacted statutory waiver provisions.

The state statutes waiving sovereign immunity are generally of three types: (1) absolute waivers; (2) limited waivers applicable only

18. Mikva, *supra* note 17, at 831.

19. See, e.g., *Black v. Rempubliam*, 1 Yeates 140 (Pa. 1792) (court held that it did not have jurisdiction to hear a case based on tortious actions of Revolutionary War officers without consent of the state); *Commonwealth v. Colquhouns*, 12 Va. (2 Hen. & M.) 213 (1808) (court held that a suit could not be maintained against the state for tortious handling of tobacco by state inspectors). For further explanation of these cases, see Kramer, *supra* note 15, at 801-03.

20. *Gross v. Kentucky Bd. of Managers of World's Columbian Exposition*, 105 Ky. 840, 49 S.W. 458 (1899).

21. See Kramer, *supra* note 15, at 806-09.

22. *Id.* at 808-09. For a summary of pre-1954 state remedies, see also Leflar & Kantrowitz, *Tort Liability of the States*, 29 N.Y.U. L. REV. 1363 (1954).

23. This note will not discuss sovereign immunity in the municipal context. The Alaska courts rejected local government immunity in *City of Fairbanks v. Schaible*, 375 P.2d 201, 208 (Alaska 1962), *overruled on other grounds*, *Scheele v. City of Anchorage*, 385 P.2d 582 (Alaska 1963) (rejected holding in *Schaible* which held that immunity was abrogated only prospectively). In Alaska, local entities are treated as ordinary tort defendants. See, e.g., *Morrison v. City of Anchorage*, 390 P.2d 782 (Alaska 1964); *Hale v. City of Anchorage*, 389 P.2d 434 (Alaska 1964).

24. 28 U.S.C. §§ 2671-2680 (1982).

25. See *id.* § 2680.

to specific types of claims; and (3) general waivers subject to certain defined exceptions.²⁶ The first type of statutory scheme absolutely abrogates state immunity. These statutes generally contain an explicit statement of state liability for the torts of governmental entities and employees. For example, the state of Washington's statute declares that the state "*shall be liable* for damages arising out of its tortious conduct to the same extent as if a private person or corporation."²⁷ The second type of statutory scheme retains sovereign immunity in general but provides limited waivers of immunity for certain state acts.²⁸ This second type of waiver provision is best typified by the California Tort Claims Act.²⁹ The state of Alaska utilizes the third type of statutory scheme, which provides a general waiver of sovereign immunity, subject to certain specified exceptions.

An exception to government tort liability which has been a major source of litigation is the discretionary function exception. This exception is included in both the Federal Tort Claims Act³⁰ and the Alaska Tort Claims Act.³¹ The exception first appeared in the Federal Tort Claims Act and was intended to preserve sovereign immunity for torts arising from "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a [governmental] agency or an employee of the Government, whether or not

26. See Comment, *supra* note 1, at 750-54.

27. WASH. REV. CODE ANN. § 4.92.090 (Cum. Supp. 1984) (emphasis added); see also Court of Claims Act, N.Y. JUD. LAW § 8 (McKinney 1963).

The Washington statute unquestionably provides for state accountability for its torts when the state performs activities which also are commonly performed by private persons and corporations. The statute, however, has been construed by the Washington Supreme Court as providing only a qualified removal of immunity. In *Evangelical United Brethren Church v. State*, 67 Wash. 2d 246, 407 P.2d 440 (1965), the majority rejected the notion that the statutory language should be construed expansively. *Id.* at 263, 407 P.2d at 449 (Finley, J., dissenting). Instead, for public policy reasons, the supreme court held that the waiver was limited and inapplicable to certain legislative, judicial, and executive processes of government not performed by private persons or corporations. *Id.* at 252-53, 407 P.2d at 444.

28. See *Policy Determination: Formulation of a Legislative Solution*, 5 CAL. L. REVISION COMM'N REP. 267, 268-69 (1963).

29. CAL. GOV'T CODE §§ 810-996.6 (West 1980 & Cum. Supp. 1985).

The California Tort Claims Act was enacted in response to the California Supreme Court's holding in *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 97 (1961), which abrogated all precedent in the area of sovereign immunity. After *Muskopf*, the California Law Revision Commission conducted a comprehensive study of the sovereign immunity problem. The findings of the Commission were generally incorporated into the California Tort Claims Act. See Comment, *Discretionary Immunity in California in the Aftermath of Johnson v. State*, 15 SANTA CLARA LAW. 454, 458 (1974-75); see also Comment, *supra* note 1, at 753 n.226.

30. 28 U.S.C. § 2680(a) (1982).

31. ALASKA STAT. § 09.50.250(1) (1983).

the discretion involved is abused.”³² The following subsections of the note examine three approaches for defining discretionary state action.

1. *The Semantic Approach.* Generally, courts have had difficulty applying the discretionary function exception.³³ Neither the Federal nor the Alaska Tort Claims Act defines the term “discretionary.” As a result, some courts have tried to develop a dictionary or semantic definition of the term.³⁴ The dictionary definition of “discretionary acts” — “[t]hose acts wherein there is no hard and fast rule as to course of conduct that one must or must not take”³⁵ — often proves to be too broad for judicial application because almost all governmental conduct involves some measure of discretionary activity. Thus, the semantic approach is largely subjective,³⁶ and claimants are left in doubt as to which are the determinative criteria in identifying discretionary governmental conduct.

The practical result of the semantic approach is that the discretionary function exception is often too broadly applied.³⁷ The broad application of the discretionary function exception can be best illustrated by use of a hypothetical.³⁸

Assume that the Alaska government built a lighthouse at Risky Inlet, Alaska. The first step toward the construction of the lighthouse was the legislative decision to establish a policy of encouraging inter-coastal commerce. This policy was effectuated by a decision to establish a coastal lighthouse network. The state legislative decisions were made at the highest level of the governmental decisionmaking process.

The implementation of the lighthouse network was delegated to the Alaska Coastal and Port Authority (CPA). The CPA engineers selected the number, locations, and designs of the various lighthouses. The engineers were authorized to consider and did consider factors such as demographics, geography, and construction costs in reaching their decisions. Ultimately, the engineers chose to construct a single lighthouse at the entrance to Risky Inlet instead of two less powerful ones. These decisions constitute the second or intermediate level of governmental decisionmaking.

32. 28 U.S.C. § 2680(a) (1982).

33. See Reynolds, *The Discretionary Function Exception of the Federal Tort Claims Act*, 57 GEO. L.J. 81, 112 (1968-69).

34. See *id.* at 108-10.

35. BLACK'S LAW DICTIONARY 419 (5th ed. 1979).

36. See Reynolds, *supra* note 33, at 110.

37. *Id.*

38. This hypothetical is also used to illustrate the operation of the two other approaches to defining discretionary acts, see *infra* text accompanying notes 46-48 & 61-63, and to compare the three approaches, see *infra* notes 64-66 and accompanying text.

After construction of the lighthouse at Risky Inlet, a crew chief was employed to operate and maintain the lighthouse. He established an inspection schedule for October which included hourly signal light inspections until midnight, and inspections every three hours from midnight until dawn. The inspection decision was made at the third or lowest level of the governmental decisionmaking process. In reaching this decision, the crew chief considered his past experience in making inspection duty assignments and his own personal convenience.

An unfortunate chain of events occurred at Risky Inlet on the thirty-first of October which raises the question of Alaska's immunity. At 12:30 a.m., unknown vandals entered the Risky Inlet lighthouse and short-circuited the emergency backup system for the lighthouse. Shortly thereafter, an electrical storm knocked out all power in the Risky Inlet area, including the electricity supplied to the lighthouse. As a result of the vandalism and the electrical storm, the lighthouse beacon was not lit when a merchant ship entered the inlet. At 2 a.m. the ship wrecked along the shoreline opposite the Risky Inlet lighthouse and adjacent to the exact location that the CPA engineers had considered for a second lighthouse. As a result, the owner of the merchant ship initiated an action against the state alleging that the state was negligent at all levels of its decisionmaking process. The legislature's policy decision to protect commercial shipping solely by establishing a lighthouse network, the CPA engineers' decision to erect only one lighthouse at the entrance to Risky Inlet, and the Risky Inlet lighthouse crew chief's decision to rely upon a relaxed inspection schedule on the thirty-first of October were all alleged to have been negligent.

Under the semantic approach to defining discretionary governmental acts, the state in the above hypothetical could successfully defend each of the merchant shipowner's claims on the grounds that each of the challenged decisions involved some form of authorized governmental judgment. Hence, the semantic approach to defining discretionary conduct is too broad because almost all conceivable governmental actions appear to be discretionary under this definition.³⁹

39. Reynolds criticizes the semantic approach for defining discretionary conduct. Reynolds noted that the approach:

might be justified as carrying out the [Federal Tort Claims] Act's literal intent, although it runs counter to congressional and judicial statements in favor of liberal relief. But it presents an added problem to courts and prospective plaintiffs by failing to provide a definition of discretion. . . . Where there is no further explanation, one can only conclude that "discretion" means *any* exercise of judgment or choice.

Reynolds, *supra* note 33, at 110.

2. *The Good Samaritan Test.* The good Samaritan test for defining the discretionary function exception originated in the federal courts.⁴⁰ The courts which follow this approach rely on the United States Supreme Court's decision in *Indian Towing Co. v. United States*,⁴¹ which imposed a duty of due care upon governmental entities and employees when, after discretion has been exercised, they undertake activities implementing the discretionary decision.⁴² The Court in *Indian Towing Co.* held that the federal government was not immune from tort liability when it failed to properly maintain a lighthouse and to give warning of its inoperative state, even though the Coast Guard was not obligated to provide any lighthouse service for shipping. Once the Coast Guard exercised its discretion and chose to provide such service, the Court held that the Coast Guard had the nondiscretionary duty to act with due care.⁴³ Theoretically, the good Samaritan test embodies a liberal construction of the government's waiver of immunity in tort liability cases.⁴⁴ In practical terms, this view of sovereign immunity allows immunity solely for the *initial* act of governmental discretion, "such as a decision to undertake a project," but does not extend the immunity to lower levels of decisionmaking, such as "the establishment of plans and specifications by administrators on an intermediate level of government."⁴⁵

The definition of discretionary governmental functions which arises from the court's reliance on the good Samaritan test results in a narrower application of the discretionary function exception than does the semantic approach.⁴⁶ This point is illustrated by applying the good Samaritan test to the Risky Inlet hypothetical. The decision of the legislature to encourage and protect intercoastal commercial shipping solely by the construction of a lighthouse network may be characterized as an initial act of governmental discretion, even if one of questionable prudence. Thus, the legislature's decision would be immune from tort liability. On the other hand, the intermediate level decision of the CPA engineers to erect only one lighthouse at the entrance to Risky Inlet, and the lower level decision of the crew chief to

40. *Id.* at 89-90. The first clear formulation of the good Samaritan test by a federal court was in *Costley v. United States*, 181 F.2d 723, 726 (5th Cir. 1950). For a discussion of the early development of the good Samaritan test, see Reynolds, *supra* note 33, at 89-90.

41. 350 U.S. 61 (1955).

42. *Id.* at 69.

43. *Id.*

44. See Reynolds, *supra* note 33, at 100. "Perhaps the greatest significance of *Indian Towing* was the Supreme Court's liberal application of the [Federal Tort Claims] Act as a whole." *Id.*

45. Comment, *Scope of the Discretionary Function Exception under the Federal Tort Claims Act*, 67 GEO. L.J. 879, 891 (1979).

46. See Reynolds, *supra* note 33, at 110.

monitor the lighthouse less frequently after midnight, would not be included within the definition of discretionary conduct under the good Samaritan test.⁴⁷ Indeed, all subsequent governmental activities implementing the lighthouse service would be considered outside the definition of discretionary conduct.⁴⁸ Therefore, the conduct of both the CPA engineers and the Risky Inlet crew chief would be subject to the due care challenges of the injured shipowner.

3. *The Planning-Operational Distinction.* Neither the narrow good Samaritan test nor the broad semantic approach to defining discretionary conduct provides an effective test to determine whether intermediate and lower level governmental activities are discretionary.⁴⁹ The planning-operational distinction, however, does provide an effective test.

Initially developed by the federal courts,⁵⁰ the planning-operational distinction goes a step beyond the good Samaritan test. Under the planning-operational test, the state's initial policy decision and all other authorized governmental activities that are based upon evaluations of basic policy factors, are considered discretionary, regardless of the level of the governmental decisionmaker.⁵¹ All of these decisions are considered planning level decisions. Therefore, the planning-operational distinction excludes from its definition of discretionary conduct day-to-day activities of governmental entities and employees⁵² which are considered operational level decisions. In *Swanson v. United States*⁵³ a federal district court provided a clear articulation of the planning-operational distinction:

47. See, e.g., *Seaboard Coast Line R.R. v. United States*, 473 F.2d 714, 716-17 (5th Cir. 1973) (held that the initial decision to build a drainage ditch was discretionary, but the government was obligated to perform the design and construction of the ditch with due care).

48. See *supra* text accompanying note 45.

49. See Reynolds, *supra* note 33, at 127-28.

50. See *id.* at 103-07. The lower federal courts rest their support for the planning-operational distinction on dictum in *Dalehite v. United States*, 346 U.S. 15 (1953). In *Dalehite*, the Supreme Court found that the federal government was immune from tort liability under the discretionary function exception for injuries caused by an explosion. In a concluding statement, the Court mentioned that the government actions considered culpable "were all responsibly made at the planning rather than operational level." *Id.* at 42. The Court, however, did not intend this statement to establish a definition of discretionary conduct under the Federal Tort Claims Act. See Peck, *The Federal Tort Claims Act, A Proposed Construction of the Discretionary Function Exception*, 31 WASH. L. REV. 207, 219 n.37 (1956).

51. See Reynolds, *supra* note 33, at 127-28, 130-31.

52. *Id.* at 129.

53. 229 F. Supp. 217, 221 (N.D. Cal. 1964) (discretionary function exception did not apply in a wrongful death action alleging governmental negligence in the design or installation of a modification of an aircraft).

In a strict sense, every action of a government employee, except perhaps a conditioned reflex action, involves the use of some degree of discretion. The planning level notion refers to decisions involving questions of policy, that is, the evaluation of factors such as the financial, political, economic, and social effects of a given plan or policy. . . .

The operation[al] level decision, on the other hand, involves decisions relating to the normal day-by-day operations of government. Decisions made at this level may involve the exercise of discretion but not the evaluation of policy factors.⁵⁴

Thus, courts which apply the planning-operational distinction do not label governmental conduct as discretionary simply by applying a semantic definition of the term. The courts also do not rely upon the often underinclusive approach of the good Samaritan test in identifying discretionary government functions. Rather, the planning-operational distinction requires a judicial inquiry into whether the challenged conduct was in fact dependent upon an evaluation of basic policy factors.⁵⁵

The advantage of the planning-operational distinction is that it is closely aligned with the legislative purpose underlying the discretionary function exception to governmental tort liability. The purpose of the discretionary function exception is the preservation of the separation of powers between coordinate branches of government.⁵⁶ Without the discretionary function exception, the courts would be obligated to reexamine every allegedly tortious governmental act and serve as the ultimate tribunal for the resolution of every political, social, and economic policy choice of the government.⁵⁷ Therefore, to effectuate the legislative purpose, the distinction designates as discretionary those activities or decisions that have been committed to either the legislative or executive branch of government and that result from the exercise of either branch's authority.⁵⁸ Additionally, courts applying the planning-operational distinction recognize that they are ill-equipped to evaluate basic policy questions.⁵⁹ Thus, once the governmental entity or employee exercises its authority, and in fact chooses a course of conduct based upon a consideration of basic policy factors,

54. *Id.* at 219-20.

55. See Harris & Schnepfer, *Federal Tort Claims Act: Discretionary Function Exception Revisited*, 31 U. MIAMI L. REV. 161, 189 (1976-77); Reynolds, *supra* note 33, at 130-31.

56. See Comment, *The Discretionary Function Exception to Government Tort Liability*, 61 MARQUETTE L. REV. 163, 166 (1977-78); see also Reynolds, *supra* note 33, at 83-84.

57. See Note, *The Discretionary-Function Exception to the Federal Tort Claims Act*, 42 ALB. L. REV. 721, 727 (1977-78).

58. See Reynolds, *supra* note 33, at 121-22.

59. See *Johnson v. State*, 69 Cal. 2d 782, 794, 447 P.2d 352, 360, 73 Cal. Rptr. 240, 248 (1968); see also Reynolds, *supra* note 33, at 121-22.

courts using the planning-operational distinction will characterize this choice as a planning level decision and refuse to examine its merits. Applied in this manner, the discretionary function exception merely provides the judiciary with a legislative basis for refusing to reexamine governmental conduct which is of a discretionary or planning nature.⁶⁰

The ability of the planning-operational distinction to provide an analytical framework for defining discretionary conduct so that it includes both initial and intermediate levels of governmental policy-making can be demonstrated by the Risky Inlet hypothetical. Clearly, the legislature's decision to promote and protect intercoastal commercial shipping solely by the establishment of a lighthouse network is an initial policy choice and therefore discretionary, even if in retrospect it evinces unsound judgment. The decision involved an assessment of economic and political policy factors which the courts will not second-guess under the separation of powers doctrine.⁶¹ The CPA engineers' decision to erect a single lighthouse at the entrance to Risky Inlet also was dependent upon an evaluation of various financial, political, and economic factors (demographic and geographic need, construction and maintenance costs, and the effectiveness of alternatives). Therefore, the engineers' decision also may be characterized as a planning level decision.⁶² The crew chief's decision to conduct less frequent checks on the facility after midnight, however, did not involve a consideration of basic policy factors because it was based upon the crew chief's convenience and past experience with maintenance problems. In fact, the choice of an inspection schedule is a normal day-to-day operation of government, that is, the type of decision which may be adjusted routinely without the evaluation of policy factors. Thus, the lower level decision of the crew chief would be classified as operational and non-discretionary, thereby subjecting the state to potential tort liability.⁶³

4. *A Comparison of the Three Approaches.* As the Risky Inlet hypothetical demonstrates, whether the court chooses the semantic, good Samaritan, or planning-operational approach will make a crucial difference in its determination whether governmental conduct is discretionary.⁶⁴ Under all three approaches, the initial decision to implement a policy, such as the legislature's decision to establish a lighthouse network in the Risky Inlet hypothetical, will be regarded as

60. See Reynolds, *supra* note 33, at 123, 130-31; see also Johnson, 69 Cal. 2d at 794, 447 P.2d at 360, 73 Cal. Rptr. at 248.

61. See *supra* text accompanying notes 56-58.

62. See *supra* text accompanying note 51.

63. See *supra* text accompanying note 52.

64. See Reynolds, *supra* note 33, at 113.

discretionary.⁶⁵ Beyond this initial policy choice, the three approaches reach different conclusions as to what constitutes discretionary conduct.⁶⁶ With regard to the intermediate levels of governmental decisions, a court following the good Samaritan approach often will classify such decisions, like those of the CPA engineers, as nondiscretionary. The classification of an activity as discretionary by a court applying the planning-operational distinction will depend upon the particular factual situation and upon whether broad policy factors were considered. A court relying on the semantic approach will be more likely to label the decision as discretionary, but the outcome will depend upon the court's definition of the term "discretionary." Lastly, the level of governmental decisions involving non-policy factors, like those of day-to-day lighthouse operations in the hypothetical, may be deemed discretionary under the semantic approach but not under the good Samaritan or planning-operational approaches.

III. EVOLUTION OF THE ALASKA APPROACH TO THE DISCRETIONARY FUNCTION EXCEPTION

A. *State v. Abbott* — Enunciation of the Planning-Operational Distinction

As the previous section illustrates, a general statutory waiver of immunity that is subject to a discretionary function exception, like the Alaska Tort Claims Act, permits the judiciary to exercise substantial freedom in construing the scope of the waiver of immunity.⁶⁷ The actual scope of the waiver of immunity depends upon the court's choice of an analytical approach to defining the discretionary function exception.⁶⁸ The Alaska Supreme Court faced this choice for the first time in *State v. Abbott*⁶⁹ and adopted the planning-operational distinction.⁷⁰

The plaintiff, Brenda Vogt, brought an action for damages against the state of Alaska under the Alaska Tort Claims Act for injuries she suffered in an automobile accident.⁷¹ She alleged that the state was "negligent in its design, construction and maintenance of the road and in failing to post signs warning of the hazardous condition of the

65. See *id.* at 124.

66. The hypothetical presented is intentionally simple to illustrate and compare the extreme outcomes under the three approaches. Outcomes will deviate depending on a particular court's articulation and application of its chosen approach.

67. ALASKA STAT. § 09.50.250 (1983); see *supra* note 3.

68. See *supra* text accompanying note 64.

69. 498 P.2d 712 (Alaska 1972).

70. *Id.* at 721.

71. *Abbott*, 498 P.2d at 715.

curve.”⁷² The superior court found that the alleged tortious activities of the state “were not within the discretionary function exception to the waiver of sovereign immunity.”⁷³ The court also held that the state of Alaska was negligent in its winter maintenance of the curve and therefore was liable for the plaintiff’s injuries.⁷⁴

On appeal, the state renewed its sovereign immunity claim for the winter road maintenance program.⁷⁵ The Alaska Supreme Court affirmed the lower court’s decision, but remanded the case for further findings of fact as to the damage award.⁷⁶

Justice Erwin, writing for the court, acknowledged that the court had never interpreted the discretionary function exception.⁷⁷ In selecting the planning-operational distinction for determining whether a discretionary governmental function was being challenged, the *Abbott* court focused on the purposes underlying the exception.⁷⁸ The court outlined the purposes behind the discretionary function exception to state liability as:

- (1) the need to preserve separation of powers by limiting judicial reexamination of decisions made by the other branches of government;
- (2) the fact that courts are not equipped to investigate and balance all the factors that go into an executive or legislative decision;
- (3) the public interest in preventing the enormous and unpredictable liability that would result from judicial reexamination of the decisions of the other branches of government.⁷⁹

The *Abbott* court perceived that the planning-operational distinction, although not a bright-line test, provided the best method for satisfying the legislature’s intent in enacting the discretionary function exception.⁸⁰

The court also chose the planning-operational distinction because it defines as planning decisions those decisions which either formulate

72. *Id.*

73. *Id.* at 716.

74. *Id.*

75. *Id.* at 716-17.

76. *Id.* at 717.

77. *Id.* The *Abbott* court held that because the critical statutory language in the Alaska Tort Claims Act was *identical* to the wording of the Federal Tort Claims Act, relevant federal case law could be considered in interpreting the discretionary function exception. *Id.* at 717 & n.2 (citing *Cesar v. Alaska Workmen’s Compensation Bd.*, 383 P.2d 805, 807 (Alaska 1963)).

78. *Abbott*, 498 P.2d at 721-22. The court in *Abbott* expressed its support for the planning-operational distinction without any reservations, even though its application would entail delicate inquiry into each case. The court stated that “[s]ince this approach has the analytic virtue of focusing on the reasons for granting immunity to the governmental entity, however, we are persuaded that it is a well-reasoned approach to the problem.” *Id.* at 721.

79. *Id.* at 721-22 (citing *Reynolds*, *supra* note 33, at 121-23, 128-31).

80. *See* 498 P.2d at 721.

basic policies and designs or fix long term goals which are deemed politically desirable.⁸¹ Nondiscretionary decisions are operational decisions, which involve routine activities or the implementation of a policy decision.⁸²

The court in *Abbott* also focused on the practical aspects of employing the planning-operational distinction. The court realized that it must accommodate the purposes which underlie the discretionary function exception in applying the distinction.⁸³ An analysis for applying the planning-operational distinction which serves the three basic purposes of the discretionary function exception is set forth below. The analysis focuses on the nature of the governmental activity or decision being challenged. The first step of the analysis determines whether the governmental decisionmakers were authorized to consider basic policy factors. In resolving this question, the court must determine whether the factors the decisionmaker was authorized to consider were *in fact* basic policy factors — that is, whether the factors involve political, economic or social concerns. A reexamination of these factors by the court would conflict with the purposes underlying the discretionary function exception (the preservation of the separation of powers, the judiciary's inability to investigate and balance such factors, and the prevention of enormous and unpredictable liability). The second step of the analysis determines whether these factors were in fact considered. If the decisionmaker was authorized to consider basic policy factors and did consider them, then the state is immune from tort liability. This analysis must be followed for a proper application of the planning-operational distinction.⁸⁴

The *Abbott* court thoughtfully considered and conclusively rejected two alternative approaches — the good Samaritan test⁸⁵ and the semantic approach.⁸⁶ The court recognized that the good Samaritan test has some merit,⁸⁷ but thought that the planning-operational distinction was superior, because it requires the courts to use an analysis which is sensitive to the preservation of the separation of powers doctrine.⁸⁸ Furthermore, the planning-operational approach does not re-

81. *See id.* at 721-22.

82. *Id.* at 721 (citing *Rogers v. State*, 51 Hawaii 293, 459 P.2d 378 (1969)).

83. 498 P.2d at 721-22 (quoting *Johnson v. State*, 69 Cal. 2d 782, 794, 447 P.2d 352, 360, 73 Cal. Rptr. 240, 248 (1968), and citing *Reynolds*, *supra* note 33, at 121-23, 128-31)).

84. *See supra* note 79 and accompanying text.

85. *See supra* text accompanying notes 40-45.

86. *See supra* text accompanying notes 34-38.

87. *Abbott*, 498 P.2d at 719-20. The *Abbott* court viewed the planning-operational distinction and the good Samaritan test as closely related, and stated that the two approaches would "lead to the same result in most cases." *Id.* at 720.

88. *Id.* at 721 (citing *Reynolds*, *supra* note 33, at 121-23, 128-31).

quire courts to conduct investigations and balance policies, processes which courts are ill-equipped to perform.⁸⁹ The semantic approach was rejected by the *Abbott* court because it lacks any analytical virtue. Under the semantic approach, a court may characterize a governmental act as discretionary without any explanation of how the court reached its conclusion.⁹⁰ In addition, the semantic approach is overly broad. The *Abbott* court recognized that almost any governmental act, even the positioning of a nail, involves some discretion.⁹¹

Despite the court's choice of the planning-operational distinction in *Abbott*, in subsequent cases the Alaska Supreme Court has not followed a consistent approach for determining whether specific actions are discretionary functions. The next sections examine these decisions.

B. Alaska's Semantic Application of the Planning-Operational Distinction.

The Alaska Supreme Court has confirmed its rejection of a strictly literal or semantic interpretation of the discretionary function exception to governmental tort liability in cases decided since *Abbott*.⁹² The court has stressed repeatedly that the focus of the inquiry in sovereign immunity cases must be on the policies which underlie the discretionary function doctrine.⁹³ As the court stated in *Adams v. State*:⁹⁴ "We have declined to use a mechanical or semantic test in determining whether a particular function or duty is discretionary; instead, we must weigh the policy considerations behind the labeling."⁹⁵ In fact, the Alaska Supreme Court adopted the planning-operational test precisely because it directs the court's attention to the policies which underlie the discretionary function exception.⁹⁶

Notwithstanding the court's professed rejection of a semantic approach and its adoption of the planning-operational distinction, the Alaska Supreme Court has frequently given a strictly literal interpretation to the words "planning" and "operational."⁹⁷ The court has

89. See *id.*

90. See *id.* at 720 (citing *Johnson*, 69 Cal.2d 782, 447 P.2d 352, 73 Cal. Rptr. 240).

91. See *id.* at 720.

92. See, e.g., *Carlson v. State*, 598 P.2d 969, 972 (Alaska 1979); *Adams v. State*, 555 P.2d 235, 243 (Alaska 1976); *State v. I'Anson*, 529 P.2d 188, 193 (Alaska 1974).

93. See, e.g., cases cited *supra* note 92.

94. 555 P.2d 235 (Alaska 1976).

95. *Id.* at 243.

96. *State v. Abbott*, 498 P.2d at 721.

97. See, e.g., *Japan Air Lines v. State*, 628 P.2d 934, 938 (Alaska 1981) (court labeled decisions concerning design of a taxiway "operational" decisions, without analyzing factors which state engineers were authorized to consider, and did consider, in making these decisions); *Jennings v. State*, 566 P.2d 1304, 1311-12 (Alaska 1977) (de-

labeled governmental actions as "planning" or "operational" by simply concluding that the actions did or did not involve basic policy determinations, without first deciding whether these actions involved determinations entrusted to a coordinate branch of government. The labels "planning" and "operational" provide no more guidance for determining whether an action is entitled to immunity than does the label "discretionary."⁹⁸ The court has simply substituted one anomalous label for another. In order for the planning-operational distinction to serve its purpose, the court must first determine whether the governmental decisionmakers were authorized to consider basic policy factors, and then whether these factors were actually considered. By determining whether the governmental decisionmaker was authorized to consider, and actually did consider, basic policy factors, the court ensures that it does not infringe upon the decisionmaking process entrusted to a coordinate branch of government and does not consider issues which it is ill-equipped to resolve.

The court used a semantic interpretation of the planning-operational distinction in *Japan Air Lines v. State*.⁹⁹ In *Japan Air Lines*, the plaintiff alleged that the state was negligent in its design of an airport taxiway, and that as a result, a Japan Air Lines (JAL) Boeing 747 slid off the taxiway while preparing for takeoff.¹⁰⁰ The court granted partial summary judgment to the state with respect to JAL's allegations of negligence in the state's design of a taxiway, which was twenty-five feet narrower than required by federal aviation standards¹⁰¹ and which failed to adhere to International Civil Aviation Organization (ICAO) standards for taxiways.¹⁰²

On appeal, the Alaska Supreme Court held that the planning-operational distinction should be used to determine whether decisions regarding the design of the taxiway were within the discretionary function exception to governmental tort liability.¹⁰³ The court concluded that the state engineers's design decisions were operational decisions which merely implemented the basic policy decision to build a taxiway suitable for use by wide-body jets.¹⁰⁴ Therefore, JAL's claim against

cisions not to provide an overpass, warning signs, or a lower speed limit were characterized as planning level decisions without a discussion of how this conclusion was reached); *State v. I'Anson*, 529 P.2d 188, 193-94 (Alaska 1974) (court conclusively stated that failure to mark and stripe a portion of highway was an "operational" decisions, which did not involve the consideration of basic policy factors).

98. For a discussion of the difficulties which result from a semantic definition of "discretionary," see *supra* text accompanying notes 34-39.

99. 628 P.2d 934 (Alaska 1981).

100. *Id.* at 935.

101. *Id.* at 936.

102. *Id.*

103. *Id.* at 938.

104. *Id.*

the state was governed by ordinary negligence principles.¹⁰⁵

When determining whether the engineering decisions in question were decisions for which the state could be held liable, the court should have analyzed the factors which the state engineers were authorized to consider, and which they did in fact consider, in making these decisions. Instead, the court merely gave a semantic interpretation to the term "operational" by labeling the engineering decisions "operational" acts without explaining how it reached this conclusion.¹⁰⁶ The purpose of the planning-operational distinction is to define the discretionary function exception by focusing the inquiry on the policies which underlie the exception.¹⁰⁷ This purpose is not fulfilled by a semantic application of the planning-operational distinction. A semantic approach does not include a determination whether the factors considered were of the broad policy type committed to another branch of government. The fact that the decisions in question were made by state engineers and not by a higher level decisionmaking body should not have been conclusive. The nature of the decision, not the status of the decisionmaker, should determine whether the discretionary function exception to tort liability applies.¹⁰⁸

The state argued in its brief that the design decisions in question were planning level decisions because they "included considerations of economy of cost and maintenance, inherent limits imposed by the airport's topography, anticipated use, meteorological conditions, durability, safety, and impact on the overall airport environment and design."¹⁰⁹ The plaintiff argued that the state engineers were not authorized to balance these factors in reaching their decisions about the length and width of the taxiway and shoulder areas, because there were specific engineering criteria and extensive federal and international standards which had to be incorporated into the taxiway plans.¹¹⁰ Thus, the plaintiff argued that the basic policy decisions had already been made with respect to the engineering decisions in question.

In order to have correctly reached its conclusion that the design decisions in question were operational under the planning-operational distinction, the *Japan Air Lines* court would have had to conclude either that the factors set forth by the state were not the broad type of

105. *Id.*

106. *See id.*

107. *See Carlson*, 598 P.2d at 972; *I'Anson*, 529 P.2d at 193; *Abbott*, 498 P.2d at 721.

108. *Carlson*, 598 P.2d at 972; Reynolds, *supra* note 33, at 130-31.

109. Respondent's Brief to Plaintiff's Petition for Review at 9, *Japan Air Lines v. State*, 628 P.2d 934 (Alaska 1981) [hereinafter cited as Respondent's Brief].

110. Plaintiffs' Supplemental Brief in Support of Petition for Review at 7-8, *Japan Air Lines v. State*, 628 P.2d 943 (Alaska 1981).

policy factors which were committed to another branch of government or that the state engineers were not authorized to balance such factors in reaching the decisions in question because of existing engineering, federal, and international standards. The court, however, merely declared that the design decisions in question were operational, stating "the ultimate conclusion rather than the underlying analysis [which is] required."¹¹¹ As a result, the court's resolution of the governmental immunity issue in this case provided no more guidance for applying the discretionary function exception than a semantic interpretation of "discretionary" would provide.

The labeling of a decision as "planning" or "operational" without a meaningful discussion of how this conclusion was reached is present in many of the cases decided by the Alaska Supreme Court.¹¹² This type of conclusive labeling, however, was avoided in a recent state immunity case decided by the Alaska Supreme Court, *Wainscott v. State*.¹¹³ In this case, the court engaged in the type of analysis which is required if the planning-operational distinction is to serve its purpose.¹¹⁴

The plaintiff in *Wainscott* brought a wrongful death action in which he alleged that his son died as a result of the state's negligent failure to equip an intersection with a sequential red, amber, and green traffic signal.¹¹⁵ The Alaska Supreme Court held that the decision to install a flashing red and yellow light in lieu of a sequential traffic signal was a planning level decision.¹¹⁶ This conclusion was reached after the court outlined the decisionmaking process of the Alaska Department of Transportation (DOT). The court explained that the DOT was given the authority to decide where to install sequential traffic signals, and pursuant to this end, the DOT prepared a priority list of safety projects.¹¹⁷ In deciding not to place the *Wainscott* accident site on the priority list, the DOT considered the disruption of traffic flow, potential traffic hazards that a sequential traffic signal might create, plans to build an overpass which would render the sequential traffic signal obsolete, and the existence of more pressing safety problems in other locations.¹¹⁸ On the basis of these facts, the *Wainscott* court determined that the decision not to install a sequential traffic signal at the accident site was a basic policy determination which had been committed to a coordinate branch of government and which the courts

111. Respondent's Brief, *supra* note 109, at 7.

112. See *supra* note 97 and accompanying text.

113. 642 P.2d 1355 (Alaska 1982).

114. See *id.* at 1357.

115. *Id.* at 1355.

116. *Id.* at 1357.

117. *Id.*

118. *Id.*

were ill-equipped to investigate and balance.¹¹⁹ Thus, the analysis used by the court in *Wainscott* avoided a mere semantic application of the planning-operational distinction. The "planning" label was applied to the allegedly negligent decision only after the court analyzed the factors the DOT was authorized to consider, and did consider, in making the decision concerning the placement of sequential traffic signals. In *Wainscott*, therefore, the planning-operational distinction served its function of directing the court's inquiry to the policies that underlie the discretionary function doctrine.

C. The Alaska Supreme Court's Rejection of a Considered Policy Evaluation Requirement

In the most recent case involving state tort liability, the Alaska Supreme Court failed to apply the method of analysis which was used in *Wainscott*. In fact, this case, *Industrial Indemnity Co. v. State*,¹²⁰ expressly rejected the part of the *Wainscott* approach which seems to require the showing of a considered policy evaluation in order for the state to be entitled to immunity.¹²¹

In *Industrial Indemnity Co.*, the court stated that it was precluded by the language of the Alaska Tort Claims Act from adopting a rule which would require the state to prove that a considered policy evaluation took place as a precondition for immunity from tort liability.¹²² The court explained that the only reason it discussed "the various elements of policy weighed" by the DOT in *Wainscott* was to "illustrate the kinds of competing factors which lie behind determinations of policy."¹²³ Given the underlying rationale of the Alaska Tort Claims Act, however, a careful reading of the Act's language suggests that the court's interpretation of the Act in *Industrial Indemnity Co.* is incorrect.

When interpreting the language of the Alaska Tort Claims Act, a court should construe the discretionary function exception to tort liability narrowly, because in Alaska "liability is the rule [and] immunity the exception."¹²⁴ The immunity exception provides that a tort action may not be brought against the state if it is "based upon the [state's] exercise or performance or failure to exercise or perform a discretionary function or duty."¹²⁵

119. *Id.*

120. 669 P.2d 561 (Alaska 1983).

121. *Id.* at 566 n.11.

122. *Id.*

123. *Id.*

124. *Japan Air Lines v. State*, 628 P.2d 934, 937 (Alaska 1981) (quoting *Adams v. State*, 555 P.2d 235, 244 (Alaska 1976)).

125. ALASKA STAT. § 09.50.250(1) (1983) (emphasis added).

A leading commentator suggests that the use of the wording "based upon" manifests an intention to create a much more limited exception than the words "arising out of" would have created.¹²⁶

If the acts or omissions on which the plaintiff bases his complaint were not acts specifically . . . encountered . . . in the discretionary determination to perform or not to perform the function or duty, the complaint is not "based upon" the performance or failure to perform such functions and duties. [The complaint] is instead, based upon acts or omissions which had nothing to do with the [discretionary] functions or duties.¹²⁷

Thus, the choice of language in the Alaska Tort Claims Act indicates that the legal authority to decide whether or not to perform an action is not the only element which must be satisfied in order for the government to enjoy discretionary function immunity. State entities or employees also must have considered the factors they were authorized to consider if the state is to be immune from tort liability. Under the Alaska Supreme Court's interpretation of the discretionary function exception in *Industrial Indemnity Co.*, however, the state only has to show that the state entity or employee had the authority to act or not act.¹²⁸ Therefore, if the state entity was authorized to consider factors which the court determines to be of a basic policy type, then, even if these factors were not actually considered, the state is still immune from tort liability. Such an outcome is contrary to the statutory language of the Alaska Tort Claims Act, because in such cases the challenged acts or omissions were not "based upon" a "discretionary determination to perform or not perform the function or duty."¹²⁹ Instead, the challenged acts or omissions were based upon non-discretionary — that is, non-basic policy — considerations.

The Alaska Supreme Court's rejection of a rule which would require the state to prove that a considered policy evaluation took place as a precondition for immunity is also in contravention of the legislative purposes behind the discretionary function exception. As discussed earlier, the principal purpose underlying the discretionary function exception to tort liability is the preservation of the separation of powers system.¹³⁰ Alaska courts must abstain from reexamining decisions "properly entrusted to other branches of government," and thereby avoid deciding issues of policy which exceed the judiciary's competence.¹³¹ The Alaska Supreme Court adopted the planning-

126. Peck, *supra* note 50, at 228.

127. *Id.*

128. See *Industrial Indemnity Co.*, 669 P.2d at 567 & n.11.

129. Peck, *supra* note 50, at 228.

130. See *supra* note 56 and accompanying text.

131. *Industrial Indemnity Co.*, 669 P.2d at 563.

operational distinction because it promotes these purposes.¹³² Thus, in cases in which basic policy factors were not considered by a state entity or employee, the judiciary would not be serving the purposes behind the discretionary exception by granting immunity to the state. As the California court in *Johnson v. State* explained:

The discretionary immunity doctrine is designed for the benefit of officials who exercise judgment. If this conscious weighing of alternatives by the state employee or entity making the decision to act or not to act in a particular case does not take place, then there is no reason for state immunity.¹³³

In such cases, the courts could analyze the decision according to ordinary standards of negligence without interfering with the political or policy judgment of another branch of government.

Contrary to the Alaska Supreme Court's holding in *Industrial Indemnity Co.*, then, a rule requiring the state to show that a considered policy evaluation actually took place before the state would be entitled to immunity is in accord with both the statutory language of the Alaska Tort Claims Act and its underlying purposes. Such a rule would place the burden of proof in governmental immunity cases on the state, the party which is in the best position to convince the court that a considered policy decision took place. Only the state can fully detail the decisionmaking process that actually took place in resolving policy decisions.¹³⁴ In some instances, of course, the mere description of the state action will suggest that governmental discretion was exercised.¹³⁵ For example, if the challenged action involved the initiation of a new state program, the court should assume that governmental discretion was exercised.¹³⁶ In most situations, however, the state would have to show how a particular decision was reached; "whether as a matter of fact substantiated by the evidence, discretion was exercised" by persons with the proper authority to make the decision.¹³⁷ For example, in the case of an engineering decision concerning the placement of a sign or the design of a road, sovereign immunity might be appropriate, but the state should have to prove that the engineer actually made a basic policy decision with respect to these matters.¹³⁸

132. See *supra* note 80 and accompanying text.

133. *Johnson v. State*, 69 Cal. 2d 782, 794-95 n.8, 447 P.2d 361, 367 n.8, 73 Cal. Rptr. 240, 249 n.8 (1968).

134. Comment, *supra* note 29, at 473.

135. *Stevenson v. State Dep't of Transportation*, 619 P.2d 247, 254, 290 Or. 3, 14 (1980).

136. *Id.*

137. Peck, *supra* note 50, at 226.

138. See *Stevenson*, 619 P.2d at 254.

D. The Alaska Supreme Court Applies the Good Samaritan Test Despite Its Rejection of this Test in *Abbott*

As discussed above, the Alaska Supreme Court has not applied the planning-operational distinction consistently in a manner that focuses the sovereign immunity inquiry on the purposes underlying the discretionary function exception. In addition, in several cases, the court seemed to abandon the planning-operational test altogether in favor of the good Samaritan test.¹³⁹ The court's use of the good Samaritan test is in direct conflict with the *Abbott* opinion, which explicitly rejected the good Samaritan approach. The *Abbott* court adopted the planning-operational distinction rather than the good Samaritan test, because the former test has the analytic virtue of focusing the court's inquiry on the reasons behind the legislative grant of sovereign immunity.¹⁴⁰ An example of the Alaska Supreme Court's use of the good Samaritan test is found in *Jennings v. State*.¹⁴¹

In *Jennings*, the plaintiff alleged that the state was negligent in failing to provide an overpass for the protection of school children who crossed a highway in order to attend a Fairbanks school.¹⁴² The plaintiff also asserted that the state was negligent in failing to provide warning signs, a lower speed limit, and additional controlled crossings on the same road.¹⁴³

The Alaska Supreme Court purported to apply the planning-operational distinction and concluded that the trial court correctly characterized the challenged decisions as planning level decisions which come within the discretionary function exception.¹⁴⁴ In actuality, however, the court seems to have used the good Samaritan test to resolve the immunity question. The court's conclusion that these were "planning level" decisions was based on its perceived contrast between the decisions being challenged and hypothesized implementation decisions. As the court stated: "[H]ad the planning level decision been made to delineate this area a school zone and then the state negligently

139. See, e.g., *Johnson v. State*, 636 P.2d 47, 65 (Alaska 1981) (The court seemed to use the good Samaritan test in resolving the immunity issue, which is revealed in its conclusion that "once the state made the decision to construct the road and crossing, the discretionary function immunity did not protect it from possible negligence liability in the operational carrying out of the basic policy-planning decision to build."); *Japan Air Lines v. State*, 628 P.2d 934, 938 (Alaska 1981) (court's conclusion that the design decisions for the taxiway merely implemented the basic policy decision to build a taxiway suitable for use by any wide body jets appears to be an application of the good Samaritan test); *Jennings v. State*, 566 P.2d 1304, 1312 (Alaska 1977) (court's use of the good Samaritan test is discussed *infra* at text accompanying notes 141-45).

140. See *supra* note 88 and accompanying text.

141. 566 P.2d 1304 (Alaska 1977).

142. *Id.* at 1305.

143. *Id.* at 1310.

144. *Id.* at 1311-12.

signed the area or negligently constructed a crosswalk, a cause of action might have arisen against the state for these negligently performed operational acts."¹⁴⁵

As discussed earlier in this note,¹⁴⁶ the good Samaritan approach, like the court's statement in *Jennings*, proceeds from the assumption that only the initial policy determination — in *Jennings*, the designation of an area as a school zone — is immune from tort liability under the discretionary function exception, and that all other state actions which implement this initial determination are subject to tort liability.¹⁴⁷ The use of the good Samaritan test to resolve state immunity cases has several drawbacks, however.

One difficulty with the good Samaritan test is that it provides no standards for determining where the initial act of discretion ends and where the duty of care in performing the act begins.¹⁴⁸ For example, the court in *Jennings* could have concluded that the initial act of discretion began and ended with the legislative determination to have certain areas declared school zones. A court applying the good Samaritan test, therefore, would have to conclude that state or local authorities were liable if they negligently exercised their authority to designate school zones, even if they considered basic policy factors in reaching their decision.

Additionally, as demonstrated in the Risky Inlet lighthouse hypothetical, there is a danger that the good Samaritan test will "afford immunity only for an initial act of discretion such as a decision to undertake a project and would not extend . . . to include the establishment of plans and specifications by administrators on an intermediate level of government."¹⁴⁹ In *Abbott*, the Alaska Supreme Court explained that the discretionary function exception to state tort liability was intended to extend immunity to basic policy decisions reached at any governmental level in order to preserve the separation of governmental powers and to prevent the courts from making decisions which they are ill-equipped to resolve.¹⁵⁰ Unlike the planning-operational distinction, the good Samaritan test fails to focus the inquiry in immunity cases on the purposes which underlie the discretionary function doctrine.

Given the analytical shortcomings of the good Samaritan test, the Alaska Supreme Court should be careful not to rely on the test in resolving state immunity cases as the court did in *Jennings*. The good

145. *Id.* at 1312 n.30.

146. *See supra* note 45 and accompanying text.

147. *Id.*

148. *See Comment, supra* note 45, at 889.

149. *Id.* at 891.

150. *See supra* note 88 and accompanying text.

Samaritan approach provides no guidance for determining where the initial act of discretion begins and ends, and intermediate level policy decisions may be the subject of tort liability even when the purposes for the legislative grant of immunity are present.

E. The Alaska Supreme Court's Tendency to Confuse the Negligence and Immunity Issues When Applying the Planning-Operational Distinction

A further weakness in the Alaska Supreme Court's resolution of state tort liability cases is the court's tendency to confuse the negligence and immunity issues. The court confused these two issues in *Jennings v. State*,¹⁵¹ and the confusion resurfaced in the court's most recent state immunity decision, *Industrial Indemnity Co. v. State*.¹⁵²

In *Industrial Indemnity Co.*, the court examined the allegedly negligent act of the state in failing to install a highway guardrail.¹⁵³ Industrial Indemnity submitted evidence which indicated that the original project proposal called for the installation of a guardrail where the accident occurred and that various highway officials had argued in favor of its installation.¹⁵⁴ Applying the planning-operational distinction, the court held that the decision not to place a guardrail at the accident site was a planning level decision because it included an assessment of competing priorities and a weighing of budgetary considerations, including the ultimate priority of funds available from the state of Alaska and the federal government.¹⁵⁵

Industrial Indemnity argued that although the decision to reduce funding for the highway in question may have been a planning level decision, the engineering decisions concerning which guardrails should be installed and which should be omitted were operational level decisions.¹⁵⁶ In rejecting this argument, the court stated that it did not know, from the facts presented, which criteria it could use to determine whether the guardrails actually built were the correct ones or

151. 556 P.2d at 1311-12. The court stated: "of controlling significance, in our view, is the fact that the child was struck . . . at a point some three blocks away from the [intersection nearest the school at which crossing safety measures had been taken]." As the dissent in *Industrial Indemnity Co.* noted, "the fact that the state provided safe passage across the busy road at the point nearest the school . . . [affects] whether the state fulfilled its duty to use reasonable care." *Industrial Indemnity Co. v. State*, 669 P.2d at 567 (Matthews, J., dissenting). This fact, however, has no bearing "at all on whether the state's decision not to build a crosswalk where the accident happened was of a planning, rather than an operational, nature." *Id.*

152. 669 P.2d 561 (Alaska 1983).

153. *Id.* at 562.

154. *Id.*

155. *Id.* at 564-65 & 564 n.7.

156. *Id.* at 565-66.

the wrong ones,¹⁵⁷ because the plaintiff made no specific allegations which would support its claim of operational negligence.¹⁵⁸

As the dissent pointed out, the majority seems to have confused the negligence and immunity issues.¹⁵⁹ The court seems to have decided that since there was no apparent engineering negligence, the state was entitled to immunity.¹⁶⁰ A court's belief that there was no negligence, however, should not affect its resolution of the immunity issue. There are likely to be cases which present a similar immunity issue, but which present clear criteria from which the court could draw the conclusion that there was negligence—for example, evidence that at a particular location there were narrow shoulders, sharp curves, and heavy traffic usage patterns; evidence of other fatalities at the location of which the state had notice; and evidence that other places along the highway with guardrails did not present such unique hazards.¹⁶¹ Instead of focusing on the plaintiff's failure to make specific allegations that would support its claim of operational negligence, the court should first have resolved the immunity issue. In resolving the immunity question, the court should have used the planning-operational test to determine whether the underlying purposes of the discretionary function doctrine were present. That is, the court should have determined whether the factors the state engineers were authorized to consider, and those that they actually did consider, were basic policy factors which courts are institutionally ill-equipped to investigate and balance.

The engineering decisions relating to the placement of guardrails in *Industrial Indemnity Co.* do not seem to involve the weighing of social, economic, or political considerations which accompany basic policy determinations. Instead, these engineering decisions seem to involve solely an evaluation of routine data, that is, existing safety hazards, and therefore appear to be operational decisions. The court should have declared that the discretionary function exception was not applicable and that the state could be found liable for the alleged negligence of the engineers. The court should have remanded the case to the trial court to resolve the negligence issue. The result here may have been the same since the plaintiff seemed to have alleged insufficient facts to support a determination of negligence. The case as it was decided, however, is bad precedent because it fails to use the planning-operational distinction to resolve the immunity issue.

157. *Id.* at 565 n.10.

158. *Id.*

159. *Id.* at 567 (Matthews, J., dissenting).

160. *Id.*

161. *Id.*

V. CONCLUSION

By enacting the Alaska Tort Claims Act, the Alaska legislature attempted to provide a more equitable procedure for the adjudication of tort claims against the state. This objective was to be achieved by making state liability the rule, but allowing a limited exception to liability when a state entity or employee acted in its discretionary capacity.

The Alaska Supreme Court in *Abbott v. State*¹⁶² adopted the planning-operational distinction for determining the scope of the discretionary function exception, an approach well adapted to the purposes behind the legislature's enactment of the Alaska Tort Claims Act. In later cases, however, the court has failed to apply this test correctly. The result is a confused judicial interpretation of the discretionary function exception. In a number of decisions, the court applied the planning-operational distinction in a semantic manner, failing to focus on the reasons behind the legislative grant of immunity to the state. In the court's most recent decision, *Industrial Indemnity Co. v. State*,¹⁶³ the court stated that it was precluded from adopting a rule which would require the state to prove that a considered policy evaluation took place as a precondition for entitlement to sovereign immunity. This statement is contrary to the language of the discretionary function exception of the Alaska Tort Claims Act and its underlying rationale. Additionally, in other cases, the court has applied the good Samaritan test instead of applying the planning-operational distinction,¹⁶⁴ and has confused the negligence and immunity issues while attempting to resolve the discretionary function determination.¹⁶⁵

In order to clarify its confused analysis of the Alaska Tort Claims Act, the Alaska Supreme Court should reaffirm the position it adopted in *Abbott*. The purposes behind the enactment of the discretionary function exception — preservation of the separation of powers doctrine, recognition of the inability of the courts to reexamine legislative or executive policy decisions, and prevention of enormous and unpredictable liability resulting from judicial reexamination of other branches's decisions — must guide the court in its application of the planning-operational distinction. In applying the distinction, the courts should clearly articulate whether the state is subject to liability before deciding the negligence issue. The courts applying the planning-operational distinction should determine whether the state official was authorized to consider basic policy factors and then whether

162. 498 P.2d 712 (Alaska 1972).

163. 669 P.2d 561 (Alaska 1983).

164. See *supra* text accompanying notes 139-50.

165. See *supra* text accompanying notes 151-61.

these factors were actually considered. The burden of proof should be on the state to demonstrate that the authorized basic policy factors were in fact considered. If the Alaska Supreme Court adopts this analysis, it would lend greater predictability to the outcome of state tort liability cases while also providing guidance to Alaska practitioners in structuring their state liability claims.

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